Mariner Post-Acute Network, Inc. d/b/a Warren Manor Nursing Home, Inc. *and* Retail, Wholesale, and Department Store Employees Union, AFL–CIO, Petitioner. Case 15–RC–8178

August 31, 1999

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on March 10, 1999,[1] and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 44 votes for and 62 against the Petitioner.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings,[2] and recommendations, and finds that the election must be set aside and a new election held.

On March 5, the Employer sent all the eligible voters a letter designed to show the negative aspects of unionization. One paragraph in the letter read:

> **LOST JOBS—The Department Store Union could mean some Warren Manor employees lose their jobs.** When the union went on strike at Demopolis, the nursing home hired new employees, and when the strike ended, many of the union's supporters had no jobs to which to return. (Emphasis in original.)

The Petitioner contends that the "Lost Jobs" paragraph tainted the March 10 election by causing voters to fear that they would lose their jobs if they voted for union representation. The Employer argues that the paragraph is not objectionable, either by itself or taken in the context of its statements made at other times during the election campaign.

The hearing officer found the "Lost Jobs" paragraph objectionable, rejecting the Employer's contention that the letter must be evaluated in the context of its other statements. She found that the letter was unambiguous on its face and therefore that it could be understood without reference to any other communications. The Employer has excepted to those findings.

We agree with the Employer that the March 5 letter should be considered in the context of the statements made at the two sets of meetings. *UARCO, Inc*., 286 NLRB 55, 58 (1987), review denied 865 F.2d 258 (6th Cir. 1988), citing *NLRB v. Virginia Electric & Power Co*., 314 U.S. 469 (1941). However, we find that, even in the context of those statements, the letter is objectionable, and we adopt the hearing officer's recommendation to set aside the election.

We affirm the hearing officer's finding that the "Lost Jobs" paragraph tended to interfere with the election by suggesting to employees that some of them might lose their jobs if there was a strike. As the hearing officer found, the Employer's letter failed to adequately explain the consequences of an economic strike and the rights of economic strikers under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). If an employer tells employees that they may lose their jobs if they go on strike, without informing them that permanently replaced strikers who make unconditional offers to return to work have the right to full reinstatement when positions become available and to be placed on a preferential hire list if positions are not available, the statement is objectionable because it conveys the prospect of total job loss. *Larson Tool & Stamping Co*., 296 NLRB 895 (1989). The March 5 letter contains no such explanation of the employees' *Laidlaw* rights.

The Employer contends, however, that it sufficiently explained the rights of strikers in meetings held both before and after March 5, when the letter was sent to the employees. Specifically, in a series of meetings conducted on February 26 and 27, the Employer said that it would bargain in good faith if the employees voted for union representation. At a second set of meetings, held on March 7 and 8, the Employer told the employees that, in the event of a strike, Warren Manor could hire permanent replacements for strikers. It also explained that when a strike ends, the strikers are placed "on a list and allowed to come back to work only when openings occur." The Employer discussed (for the first time) the strike at a Demopolis, Alabama nursing home that had been mentioned in the March 5 letter, which had resulted in numerous strikers' being permanently replaced. The Employer notes that the meetings were mandatory, and consequently that all or virtually all employees heard the statements made at those meetings, none of which are alleged to be objectionable. It therefore argues that, taken in the context of its statements at the meetings, the "Lost Jobs" paragraph did not misinform employees of the rights of strikers.

We reject this argument because we find that the objectionable language contained in the "Lost Jobs" paragraph had a reasonable tendency to coerce employees and thereby to interfere with their free choice in the election, even considered in the context of the statements the Employer made at the meetings with employees. Cf. *Uarco, Inc.*, supra, 286 NLRB at 58. Thus, at the meetings, the Employer did not specifically address or try to correct the letter's objectionable language. The letter was not mentioned once at the meetings. Because the Employer did not acknowledge, let alone repudiate, the improper implications of the "Lost Jobs" statements, it of

[1] All dates refer to 1999.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the Petitioner's objections be overruled except with regard to the "Lost Jobs" paragraph, discussed below.

course did not assure the employees that Warren Manor would not engage in objectionable conduct in the future. Cf. *Columbia Alaska Regional Hospital*, 327 NLRB 876 (1999).[3]

Moreover, we think it likely that the statements in the letter would have a more lasting impact on employees than the Employer's oral statements**.** The letter, with its straightforward, boldfaced warning "LOST JOBS—The Department Store Union could mean some Warren Manor employees lose their jobs," was a tangible, physical statement that voters could refer to again and again, in contrast to the more nuanced, but transitory, pronouncements made at the meetings. In these circumstances, we find that the latter statements would not tend to overcome the more dramatic and long-lasting effects of the "Lost Jobs" paragraph.

For the foregoing reasons, we conclude that the Employer's statements at the meetings did not cure the objectionable language of the March 5 letter and therefore that the election must be set aside.[4]

[Direction of Second Election omitted from publication.]

[3] Member Hurtgen does not necessarily agree with all of the requirements for repudiation as set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). See *Columbia Alaska*, supra at 877 fn. 6. However, he agrees that the Employer did not effectively repudiate the "Lost Jobs" statement of its March 5 letter.

[4] In adopting the hearing officer's recommendation that the election be set aside, we note that she inadvertently stated that one of the factors to be considered was the number of "violations" alleged, rather than the number of instances of objectionable conduct found. It is clear, however, that she actually applied the correct standard in arriving at her recommendation.